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SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOHN L. KEMMERER and
JAMES L. JORDAN,

Petitioners,

v.

ICI AMERICAS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In a case involving an employer's premature termination of a deferred compensation plan enforceable under ERISA:

(a) Are damages for the loss of the benefits of tax deferral too speculative to be recoverable because they necessarily depend on unpredictable future tax rates?

(b) Are such damages too speculative to be recoverable because at some hypothetical future time the employer might not have been financially able to make the promised deferred compensation payments?

(c) By so holding, did the Court of Appeals impermissibly ignore the Congressional intent as expressed in ERISA that such deferred compensation plans be enforceable?

LIST OF ALL PARTIES

The caption contains the names of all parties.

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OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 70 F.3d 281 (3d Cir. 1995) and appears in the attached appendix at pages 1a through 17a. The opinion of the United States District Court for the Eastern District of Pennsylvania, dated December 22, 1994, is unreported and appears in the attached appendix at pages 18a through 23a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit filed its opinion and judgment on November 17, 1995 and denied a timely petition for rehearing and rehearing in banc on December 19, 1995. (See attached appendix at 1a-17a & 24a-25a). This petition is filed within ninety days of the denial of rehearing. Jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATUTES

29 U.S.C. § 1001(b)

"It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."

29 U.S.C. § 1132(a)(1)(B)

"A civil action may be brought by a participant or beneficiary ... to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . ."

STATEMENT OF THE CASE

Petitioners are retired executives of ICI Americas, Inc., who were participants in an unfunded deferred compensation plan (the "Plan") that was subject to the enforcement provisions of ERISA. Pursuant to the Plan, on his retirement in 1986 petitioner Jordan elected to receive his deferred compensation and the earnings thereon in installments over a period of 21 years, through 2007. Petitioner Kemmerer retired in 1988 and elected to receive the funds over a similarly

extended period. No taxes were payable on the deferred compensation or the "earnings" thereon until receipt.[1]

In late 1991, ICI unilaterally terminated the Plan, established a new and similar plan into which only active executives could roll over their account balances and continue to defer taxation, and paid the retired executives their accumulated account balances in three annual lump sum installments with 10% interest on the unpaid balances.

Petitioners demanded that ICI honor its agreement by adhering to the agreed-upon extended payment schedule. ICI ignored their protests and wired the lump-sum distributions into their bank accounts. An internal review procedure thereafter denied them any relief and they filed suit.[2] The district court granted petitioners' summary judgment motion on liability in January 1994, finding that ICI's premature termination of the Plan was a violation of the terms of the Plan and of ERISA. At the damage trial that followed, however, the district court concluded that petitioners had not met their burden of proving that they were damaged.

In affirming,[3] the United States Court of Appeals for the Third Circuit concluded that damages for the loss of tax deferral that occurs when a deferred compensation plan is prematurely terminated are too speculative to be recoverable

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1. There were no actual earnings because ICI had free use of the funds. Instead, petitioners designated investment portfolios available in another ICI plan, and ICI credited their deferred salaries with the same rate of return.

Hereafter this Petition will refer to only the facts pertaining to Jordan. In all relevant respects the facts pertaining to Kemmerer do not differ from those pertaining to Jordan.

2. The district court had subject matter jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 & 1332(a), and 29 U.S.C. § 1132(e).

3. Petitioners do not regard as appropriate reasons for *certiorari* the Court of Appeals' affirmance of the district court's erroneous application of burden of proof principles and its failure to follow the requirements of Fed.R.Civ.Proc. 52(a). Those errors however help explain the result below and therefore are preserved, and are described in the appendix hereto at 47a through 49a. Petitioners also preserve the issue of whether the Court of Appeals erred in holding that the district court's finding that petitioners suffered no transaction costs was supported by the record. (See Appellants' Brief below, at pp. 26-28.)

because they depend on unknowable future tax rates. It concluded too, as the district court had, that a "risk premium" had to be applied in any damage calculation to account for the possibility that ICI might not have been financially able to make the agreed-upon future payments.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Introduction and Summary

After petitioners completed their financial planning for their retirement years and had retired, their employer breached the terms of a deferred compensation plan by terminating it and paying out participants' funds over three years instead of sixteen as originally agreed. The Court of Appeals, in affirming a judgment in favor of the employer on damages, held that when damages are dependent on unknowable future tax rates (as damages for the premature termination of tax-deferred plans necessarily are) they are too speculative to be recoverable. This holding is directly at odds with a decision of the Court of Appeals for the Seventh Circuit, the only other reported decision that speaks to the issue.

The Court of Appeals also held that a damage award must be reduced by a "risk factor" to account for the possibility that the employer might not have been financially able to make all of the promised future payments, and that petitioners' failure to take that into account likewise rendered damages too speculative to be recoverable. This holding is so novel that neither counsel for ICI, nor the district court, nor the Court of Appeals cited any supporting authority for it. Moreover, this holding appears to be contrary to the reasoning behind this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541 (1983). See footnote 9, *infra.*

In enacting ERISA, the Congress authorized the evolution of a federal common law that would apply to plans covered by ERISA. See *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 110, 109 S.Ct. 948, 954 (1989). The foregoing two erroneous holdings, frustrating the Congressional intent that

deferred compensation plans be *enforceable* under ERISA, represent early and serious missteps in that evolutionary process. They should be corrected now, before other employers feel free to prematurely terminate deferred compensation plans with impunity because no damages can flow therefrom, and other retirees are damaged as petitioners were.

I. Legal damages that depend for their calculation on future tax rates are not so speculative as to be unrecoverable. They can and should be determined by applying traditional burden of proof principles, as was done by the Court of Appeals for the Seventh Circuit.

What the breach of the Plan caused petitioners to lose was thirteen years of investment income on tax payments they made that otherwise would have been deferred to a much later date. That calculation requires, *inter alia,* some assumption regarding what their tax payments would have been in the future had the Plan not been breached.[4] The Court of Appeals, however, concluded that because future tax rates are by their nature unknowable, damages based on assumptions about them are so speculative as to be unascertainable. The decision is directly contrary to the conclusion reached by another Court of Appeals.

The Seventh Circuit in *Oddi v. Ayco Corp.,* 947 F.2d 257, 261-62 (7th Cir. 1992), carefully considered the issue of how to calculate damages when unknowable future tax rates are an essential component of the calculation. The plaintiff in *Oddi*

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4. For example, Petitioner Jordan's fund balance at year-end 1991, $4,674,439, was paid to him over a period of three years (1992-94) instead of sixteen years (1992-2007). Consequently the federal taxes thereon, $1,770,271, were likewise paid over three years. Had the fund balance been paid to him over 16 years, as agreed, he would have paid only $564,581 in taxes in those three years and would have earned investment income on the $1,205,690 difference. It is that investment income, net of taxes, that he lost.

Marginal tax rates were 31% when the first two payments were made and 39.6% when the third payment was made. Petitioners' damage calculations conservatively assumed that the higher rate would remain in effect thereafter, through 2007. That assumption was never challenged either by ICI or the trial court.

had chosen early retirement and had a choice of taking a lump sum distribution of his profit sharing funds or rolling them over into an IRA for continued tax-deferred savings until 2017. The defendant financial advisor, because of a computational error, convinced him that there was a three million dollar advantage in taking the lump sum distribution when in fact there was a two million dollar disadvantage. In the suit that followed, the defendant advisor argued that if tax rates were to increase sufficiently from their then historically low maximum rate of 28%, there would be no damages at all. The court held that the burden of proving that future tax rates will change is on the party making that assertion, and created a rebuttable presumption that the status quo will continue. "[T]o deny plaintiffs the benefit of a presumption", the court held, "would absolve financial advisors of any liability for their erroneous advise."[5] The same must be said here. To deny petitioners the benefit of a presumption of continuity in the tax rates would give employers *carte blanche* to prematurely terminate tax deferred plans.

This case, which involves not an act of negligence but a very purposeful breach of an ERISA-protected plan, is far more compelling than *Oddi*. The remedies allowed by ERISA are exclusive; no common law contract action may be brought for such a breach. *Pane v. RCA Corp.*, 868 F.2d 631, 635 (3d Cir. 1989). ERISA was "designed to protect the integrity of [employee benefit] plans and the expectations of their participants and beneficiaries." *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 929 (3d Cir. 1985), *rev'd in part on other grounds, Pritzker v. Merrill Lynch, Pierce, Fenner and Smith*, 7 F.3d 1110 (3d Cir. 1993); see also 29 U.S.C. § 1001(b) (stating Congressional policy). Unfunded deferred compensation plans such as the instant plan, however, were exempted from all of ERISA's protective provisions (relating to vesting, funding, and fiduciary responsibility) *except* its enforcement provisions. *Id.* at 930, 935-37. The Court of Appeals, by holding that damages are not recoverable because future tax rates are specula-

5. *Id.* at 262.

tive, has radically diminished the only protection the Congress intended such retired employees to have.[6]

In fashioning a federal common law under ERISA, our courts should not set aside principles that are as deeply imbedded in our jurisprudence as is the principle that damages which are "foreseeable and in the reasonable contemplation of the parties" are recoverable. *Hadley v. Baxendale,* 9 Exch. 341, 156 Eng. Reprint 145 (1854). The benefit of tax deferral was the very essence of the deferred compensation agreement, as it is the essence of IRA's, 401K's and all of the retirement plans protected by ERISA. The whole purpose of such plans is to allow participants to earn investment income on the money that would otherwise be paid in taxes, and to defer taxes on that investment income as well, until such time as the deferred moneys are paid to them incrementally during their retirement years. But for the benefits of tax deferral, few if any employees would give up control of their own funds and allow an employer to retain and invest a part of their salary.[7] Indeed ICI terminated the Plan after having actually calcu-

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6. Injunctive relief is not a realistic enforcement alternative. Once such a plan is terminated, albeit wrongly, participants will have constructively received the funds and therefore lost the benefits of tax deferral. The effectiveness of injunctive relief thus depends on whether a participant can obtain an injunction before the employer has already terminated the plan. Moreover, an employer's administrative review process may impede a participant's ability to obtain an injunction. In this case, petitioners formally demanded that ICI not terminate the plan, and ICI rejected that demand but instructed petitioners to seek review through an internal administrative process. Before ICI's internal review was completed, the funds were wired into petitioners' accounts. Finally, until the Court of Appeals held that damages depending on future tax rates were too speculative to be recoverable, there was no reason to believe that money damages were inadequate and therefore there was no reason to believe that injunctive relief could be granted. *See, e.g., In re Arthur Treacher's Franchisee Litig.,* 689 F.2d 1137, 1143 (3d Cir. 1982) ("we have never upheld an injuction where the claimed injury constituted a loss of money, a loss capable of recoupment in a proper action at law").

7. ICI itself urged participants to take advantage of the benefits of tax deferral in its publications relating to its various tax-deferred plans. "If at all possible, you should attempt to contribute the maximum, as the benefit of tax-free compounding over time can be significant.... Regardless of whether your contribution is tax-deductible, it pays to take full advantage of

lated how badly the retired participants would be damaged thereby. (See Appendix at 43a-46a and 47a-48a). Thus the damage from the loss of sixteen years of tax deferral was entirely foreseeable and in the reasonable contemplation of the parties and should have been allowed under *Hadley v. Baxendale's* enduring authority. *Beggs v. Dougherty Overseas, Inc.*, 287 F.2d 80, 83 (2d Cir. 1961).

II. When an employer breaches a deferred compensation plan by terminating it prematurely, the resulting damages may not be reduced by a "risk factor" to account for the possibility that the employer might not have been able to make the payments in the future.

It may be said that any defendant, no matter how solvent, may at some indeterminate date in the future become insolvent and be unable to pay its debts. It is, however, yet another radical departure from traditional American legal concepts to relieve a solvent defendant on that account from the consequences of its breach of a promise to make future payments. Here, the Court of Appeals not only held that a premium reflecting that risk may be applied to reduce damages; it held also that such a risk premium *must* be applied or damages (for this reason too) would be so speculative as to be unrecoverable.

The idea of such a risk premium was developed by one of ICI's expert witnesses at trial. He reasoned that any company that wants to issue 30-year bonds pays its lenders a risk premium — an interest rate over and above the interest paid by the United States government on 30-year treasury bonds — the amount of which depends on credit ratings made by Standard & Poor or Moody. Similarly here, he opined, it was necessary to analyze ICI's credit in order to measure the chances that it might not have been able to make some or all of the promised future payments to plaintiffs, and then to reduce

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NOTES *(Continued)*

an IRA's tax-deferred growth." Plaintiffs' Exhibit 5 (reproduced in the appendix below at 1243a-1246a).

damages by an appropriate risk premium.[8] Respectfully, the bond market analogy makes no sense. It is the *borrower* who pays the risk premium in the bond market. Here ICI is the party who "borrowed" a portion of its employees' compensation. Yet that is the concept that both the trial court and the Court of Appeals accepted, without any analysis whatsoever.

The idea that "risk premium" concepts should have any place in damage calculations is so novel that neither the trial judge in his Opinion nor the defendant in successfully urging the trial judge to accept the concept, nor the Court of Appeals was able to cite a single case or other authority in support of it.[9] This radically new concept should have no place in the

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8. See Defendant's Exhibits 11 and 42 (reproduced in the appendix below with relevant portions at 1711a and 1886a-1890a, respectively).

9. In contract claims for breach of a multi-year employment contract, or for the loss of a stream of promised future payments, damages are never reduced by a "risk discount" for the possibility that the employer might not be in business for the full contract term. See 3 D. Dobbs, *Dobbs Law of Remedies; Damages, Equity, Restitution* §12.6(1)(4), at 126 (2d Ed. 1993) ("Once an appropriate interest or 'discount' rate is determined [reducing the award to present value], the operation is a mathematical one. No further discount is required for the fact that the defendant might have been unable to perform its contract in the future or might have escaped liability at some future time because of impossibility or the like.")

Similarly in tort law, if a 40 year old man is totally disabled in an accident and sues the wrongdoer for the wages he would have earned during the 25 year period of his working life expectancy, to age 65, a jury is instructed on how to calculate 25 years of lost wages and reduce them to present value. They are *not* instructed to apply a "risk discount" in order to account *either* for the possibility that the defendant may not be able to perform, *or* for the very real statistical fact that a large percentage of 40 year old men never reach the age of 65. See *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 537, 103 S. Ct. 2541, 2550 (1983), where this Court held that, to the contrary, in discounting to present value "[t]he discount rate should be based on the rate of interest that would be earned on 'the best and safest investments.' Once it is assumed that the injured worker would definitely have worked for a specific term of years, he is entitled to a *risk-free* stream of future income to replace his lost wages; therefore, *the discount rate should not reflect the market's premium for investors who are willing to accept some risk of default."* (emphasis added). See *Reilly v. U.S.,* 665 F. Supp. 976, 1018-19 (D.R.I. 1987), *aff'd in relevant part and remanded,* 863 F.2d 149 (1st Cir. 1988) (damage award not excessive by virtue of fact that heirs would receive a windfall if plaintiff did not live out her life expectancy); *Nemmers*

evolving ERISA federal common law. The Congress of the United States wanted Plan beneficiaries to have the protection of ERISA's enforcement provisions. This previously unheard of damage concept is nothing more than another way to frustrate that Congressional intent. It should not be allowed.

ICI's argument in support of a risk premium comes down to this: Despite its clear breach of contract in violation of ERISA, petitioners should not be awarded damages because they have been relieved of the possibility that some future ICI financial debacle could harm them, and the value of that "benefit" should be set-off against any damages petitioners may have incurred. That such an argument is ludicrous is apparent; that it was accepted by the Third Circuit is surprising. Certainly, such a principle should not become part of a newly emerging body of federal common law under ERISA.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully pray that an appropriate writ of *certiorari* be issued.

Respectfully submitted,

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DATED: March 18, 1996

NOTES *(Continued)*

v. U.S., 795 F.2d 628, 635 (7th Cir. 1986); *American List Corp. v. U.S. News & World Report, Inc.*, 549 N.E. 2d 1161 (N.Y. 1989).

Filed November 17, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-1071 and 95-1098

JOHN L. KEMMERER; JAMES H. JORDAN,
Appellants in No. 95-1071

v.

ICI AMERICAS INC.

JOHN L. KEMMERER; JAMES H. JORDAN,

v.

ICI AMERICAS INC.,
Appellant in No. 95-1098

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 92-5986)

Argued October 11, 1995
BEFORE: GREENBERG, LEWIS, AND ROSENN,
Circuit Judges
(Filed: November 17, 1995)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

In this case, arising under the Employee Retirement Income Security Act (ERISA), the district court held that the defendant company breached the terms of the executive deferred compensation plan that it offered to its highly compensated employees. Yet it also held that the appellants — participants in that plan — failed to prove they suffered any damages as a result of the breach. We hold that the district court correctly decided both issues and therefore we will affirm its judgments.

I. Introduction

Appellants John L. Kemmerer and James H. Jordan were high level executives of the defendant, ICI Americas Inc.[1] ICI offered its employees the opportunity to participate in a number of benefit plans. The dispute on appeal centers around its executive deferred compensation plan (the DEC plan), which like all such plans is commonly referred to as a "top hat" plan. Specifically, ICI encouraged its high level executives to participate in the DEC plan, under which participants deferred receipt of a percentage of their income, and thus initially reduced their annual taxable income. Although the DEC plan was unfunded, its participants were allowed to track or shadow investment portfolios available to participants of an ICI deferred contribution plan. ICI would credit the participants' balances in the DEC plan as though the hypothetical investments actually had been made. Appellants participated in the DEC plan.

An executive's account balance in the DEC plan became payable after the executive left ICI's employ. The DEC plan

1. ICI Americas Inc. explains in its brief that it has changed its name to Zeneca Inc. and that the company now known as ICI Americas Inc. is an entirely different corporation which came into existence as a result of a reorganization of the business that began in late 1992. Nevertheless, as a matter of convenience, we refer to the defendant as ICI.

permitted participants to elect the method of payment by which distributions would be made. In this regard, the plan was amended on February 1, 1985, to state:

> Amounts deferred under this agreement shall be paid to Optionee commencing January 15 of the year following the year of his separation from service in five percentage installments . . . unless, prior to separation from service the Optionee files a written notice with the Secretary of Company, ('Secretary') requesting a different form of distribution. Such notice shall be treated as an election by the Optionee to receive payment by the method requested. The method of distribution requested shall be irrevocable after the close of business on the date of Optionee's separation from service.

Kemmerer v. ICI Americas, Inc., 842 F. Supp. 138, 139-40 (E.D. Pa. 1994).[2] Pursuant to this provision, "Jordan elected to have his DEC benefits paid in specific annual amounts until the year 2007. Kemmerer elected to have his plan balance distributed in fixed annual amounts until such time as his account balance would be exhausted." *Id.* at 140. After Kemmerer and Jordan retired (in 1986 and 1989 respectively), ICI began distributing their benefits in accordance with their respective elections. In 1991, however, ICI unilaterally decided to terminate the DEC plan. At that point, rather than complying with its retired executives' elections, ICI decided to distribute their accumulated account balances in three annual installments, with 10% interest on the unpaid balances, to be paid in January 1992, January 1993, and January 1994. ICI advised appellants of this change by letters dated November 29, 1991.

On October 16, 1992, after ICI made one payment on the new distribution schedule, appellants filed this action in the district court contending that, by terminating the DEC plan after their rights in it had vested, ICI breached its contractual obligations and thereby violated ERISA. They requested monetary damages for the benefits lost as a consequence of

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2. We simplify our discussion of ICI's plans to encompass only what is relevant on appeal. The district court's opinion discusses the various plans in greater detail. *See Kemmerer*, 842 F. Supp. at 139-40.

ICI's breach of the plan. In this litigation, they contend that the early termination of the plan had adverse tax consequences to them and required them to incur fees for financial management they otherwise would not have incurred. They do not contend, however, that ICI did not pay them the full amount of their account balances. Consequently, they are in the position, unusual if not unprecedented for plaintiffs, of suing for damages because they were paid money owed to them. Eventually appellants and ICI filed cross-motions for summary judgment on liability, and ICI filed a motion for summary judgment on damages. In an opinion filed on January 4, 1994, reported at 842 F. Supp. 138, the district court granted appellants' motion for summary judgment on liability, and denied ICI's motions on both liability and damages. The court entered an order on January 5, 1994, in accordance with its opinion.

The district court held a nonjury damages trial in October 1994. In an unreported memorandum opinion filed on December 22, 1994, the court rejected appellants' argument that ICI had the burden of proof and held that appellants had failed to prove that they suffered damages as a result of ICI's conduct. Accordingly, it entered a judgment in favor of ICI on December 23, 1994. On January 19, 1995, the parties stipulated, and the court ordered, that all claims except those for attorneys' fees and costs had been resolved. The court stayed proceedings as to those items pending the completion of this appeal. Both parties then filed appeals, appellants from the order of December 23, 1994, and ICI from the order of January 5, 1994.

Arguably, we should dismiss ICI's appeal, as ICI could challenge the district court's finding of liability in this court as an alternative ground for us to affirm. *See Armotek Indus., Inc. v. Employers Ins. of Wausau*, 952 F.2d 756, 759 n.3 (3d Cir. 1991). But we will not do so because appellants have filed a fee petition which, as we have indicated, the district court has stayed pending disposition of this appeal. Thus, even though we affirm on the damages issue, ICI may be aggrieved by the judgment on liability, because the district court may conclude that, on the basis of that judgment alone, it can award the

appellants counsel fees.[3] Of course, we express no opinion on this point. However, in view of ICI's success at trial on the damages issue, its appeal from the denial of its motion for summary judgment on damages is moot and we will not consider it. *See McDaniels v. Flick*, 59 F.3d 446, 448 n.1 (3d Cir. 1995). We have jurisdiction over appellants' appeal pursuant to 28 U.S.C. § 1291. The district court exercised diversity of citizenship and federal question jurisdiction under 28 U.S.C. § 1332(a) and 29 U.S.C. § 1132(e).

II. Discussion

A. Liability

We first consider whether the district court erred in concluding that ICI breached the terms of the DEC plan. We exercise plenary review on this issue as the district court granted the appellants' motion for summary judgment. *See Petruzzi's IGA Supermarket, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir.), *cert. denied*, 114 S.Ct. 554 (1993).

With the passage of ERISA, Congress set out to "assure the equitable character of employee benefit plans and their financial soundness." *Moench v. Robertson*, 62 F.2d, 553, 560 (3d Cir. 1995) (citing *Central States, Southeast and Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570, 105 S.Ct. 2833, 2840 (1985)) (internal quotations and alterations omitted). ERISA broadly defines the terms "employee pension benefit plan" and "pension plan" to include any plan established or maintained by an employer that, by its express terms:

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3. In theory, we could conclude that until such time as the district court enters an award of fees against ICI, if it does so, ICI has not been aggrieved by the liability judgment and that we therefore should dismiss its appeal. However, we will not take that approach, as the liability issue has been briefed fully and, in any event, we can consider ICI's challenge on that issue as an alternative basis to affirm. Furthermore, we think that resolution of the liability issue at this time may aid in concluding this case. Of course, there is no doubt but that we have the power to consider the issue. *See United States v. Tabor Court Realty Corp.*, 943 F.2d 335, 342-44 (3d Cir. 1991), *cert. denied*, 502 U.S. 1093, 112 S.Ct. 1167 (1992).

> results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A)(ii). Thus, top hat plans clearly are subject to ERISA. Nonetheless, not every type of pension plan is subject to all of ERISA's stringent requirements. Congress imposed strict regulations over plans whose participants and beneficiaries it most desired to protect — employer-funded plans designed to secure employees' financial security upon retirement. ERISA imposes upon the trustees and sponsors of such plans strict fiduciary duties and standards of care and further provides for detailed disclosure and vesting requirements. Top hat plans, however, which benefit only highly compensated executives, and largely exist as devices to defer taxes, do not require such scrutiny and are exempted from much of ERISA's regulatory scheme. *See Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 930 n.7 (3d Cir. 1985).[4] In particular, top hat plans are not subject to certain vesting, participation, and fiduciary requirements. *Id.* at 930-31. But despite the exemption of top hat plans from many of ERISA's regulations, ERISA's enforcement provision clearly permits participants in top hat plans, as well as other covered plans, to bring civil actions "to enforce the substantive provisions of the Act or to recover benefits due or otherwise enforce the terms of the plan." *Id.* at 935; *see* 29 U.S.C. § 1132(1)(B) ("A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.").

Contrary to ICI's intimations, then, Congress' decision to exempt top hat plans from certain fiduciary standards does not

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4. We overruled *Barrowclough* insofar as it held that arbitration of statutory ERISA claims is precluded in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993), but *Barrowclough* remains good law on the points for which we cite it here.

mean that courts may not review their trustees' and sponsors' actions. Rather, the exemption means only that they are not held to the strict *fiduciary* standards of loyalty and care otherwise applicable to ERISA fiduciaries.

In holding that ICI breached the terms of the plan, the district court appropriately applied contract principles. As we pointed out in *Barrowclough,* "this court has repeatedly considered claims for benefits by participants . . . that are based on the terms of or rights under a plan" even though such claims are based not on fiduciary duties but on "breach[es] of contract of an employee benefit plan." *Id.* at 935-36. Thus, in such instances, breach of contract principles, applied as a matter of federal common law, govern disputes arising out of the plan documents. In determining how to apply these principles, the district court followed the analysis in *Carr v. First Nationwide Bank,* 816 F. Supp. 1476 (N.D. Cal. 1993), which held that top hat plans should be interpreted in keeping with the principles that govern unilateral contracts.

Applying those principles to ICI's DEC plan, the district court noted that the plan provides that "amounts deferred . . . shall be paid . . . in five percentage installments unless . . . the Optionee files a written notice with the Secretary of Company . . . , requesting a different form of distribution." *Kemmerer,* 842 F. Supp. at 145. Therefore, the court reasoned, when appellants complied with all the prerequisites to vesting they accepted the ICI's offer. The plan terms then required ICI to fulfill its end of the bargain by making payments consistent with appellants' respective elections.

We agree. "A pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years." *Pratt v. Petroleum Prod. Management Employee Sav. Plan,* 920 F.2d 651, 661 (10th Cir. 1990) (internal quotation marks omitted); *Carr,* 816 F. Supp. at 1488 ("[P]ension benefit plans are unilateral contracts which employees accept by appropriate performance."). Thus, the plan constitutes an offer that the employee, by participating in the plan, electing a distributive scheme, and serving the employer for the requisite number of years, accepts by performance. Under unilat-

eral contract principles, once the employee performs, the offer becomes irrevocable, the contract is completed, and the employer is required to comply with its side of the bargain. Accordingly, when a participant leaves the employ of the company, the trustee is "required to determine benefits in accordance with the plan then in effect." *Pratt*, 920 F.2d at 661. As a corollary, "[s]ubsequent unilateral adoption of an amendment which is then used to defeat or diminish the [employee's] fully vested rights under the governing plan document is . . . ineffective." *Id.* Therefore, the district court correctly concluded that after the appellants' rights had vested when they completed performance, ICI could not terminate the plan in the absence of a specific provision in the plan authorizing it to do so.

ICI seeks to avoid this result by arguing that the plan terms do not impede its ability to terminate the plan. Specifically, ICI objects to what it perceives to be the district court's overbroad holding — that in order to retain the power to terminate a top hat plan a company explicitly must reserve the right to do so in the plan documents. In the first place, ICI's argument is simply wrong after *Barrowclough* because it has no basis in contract law. In addition, we find ICI's argument more than minimally unfair. As the *Carr* court recognized, even when a plan reserves to the sponsor an explicit right to terminate the plan, acceptance by performance closes that door under unilateral contract principles (unless an explicit right to terminate or amend after the participants' performance is reserved). "Any other interpretation . . . would make the Plan's several specific and mandatory provisions ineffective, rendering the promises embodied therein completely illusory." *Carr*, 816 F. Supp. at 1494. Thus, there is no presumption that an employer may terminate a top hat plan. Rather, the plan should be interpreted under principles of contract law. Consequently, a court must determine whether an employer has a right to terminate a plan by construing the terms of the plan itself.

ICI also contends that our result is incongruous because in its view we accord participants in unfunded plans more protection than participants in funded plans. Although the cases

applying unilateral contract principles generally involve funded rather than unfunded plans, we agree with the *Carr* court that the cases' "holdings . . . did not rely on ERISA's provisions," *id.* at 1488, but rather on principles of contract law. *Id., see also Pratt,* 920 F.2d at 658. Indeed, any other result would eviscerate our holding in *Barrowclough* that participants in unfunded deferred compensation plans may sue to enforce the terms of the plan under contract principles.

In this regard, ICI's reliance on *Hozier v. Midwest Fasteners, Inc.,* 908 F.2d 1155 (3d Cir. 1990), is misplaced. In that case, we pointed out that "virtually every circuit has rejected the proposition that ERISA's fiduciary duties attach to an employer's decision whether or not to amend an employee benefit plan." *Id.* at 1161. Of course, that only means that ERISA's fiduciary duties themselves do not *per se* "prohibit a company from eliminating previously offered benefits." (*Phillips v. Amoco Oil Co.,* 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied,* 481 U.S. 1016, 107 S.Ct. 1893 (1987)). As one court has explained, "when an employer decides to establish, amend, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards." *Musto v. American Gen. Corp.,* 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied,* 490 U.S. 1020, 109 S.Ct. 1745 (1989); *see also Carr,* 816 F. Supp. at 1489 ("[T]he rule that [funded] welfare benefit plans are freely amendable means that the amendment or termination of such plans is not governed by the fiduciary duty provisions of ERISA.").

But these cases do not say anything about the application of unilateral contract principles to an employer's actions in terminating a plan. The fact that fiduciary standards are inapplicable "does not give employers carte blanche to amend welfare benefit plans where the plans themselves may be interpreted to provide that benefits are contractually vested or accrued." *Carr,* 816 F. Supp. at 1489. And, as we discussed above, those principles clearly apply after performance is complete and the participant's rights have vested. Moreover, nothing in ERISA prohibits the parties from contracting to limit the employer's right to amend or terminate a plan. Indeed, the

point of our holding in *Barrowclough* was to ensure that participants in ERISA plans have an ERISA-based right to sue under contract principles to enforce the terms of the plan. As the district court reasoned, Congress exempted top hat plans from ERISA's vesting requirements in large part because it recognized that high level executives retain sufficient bargaining power to negotiate particular terms and rights under the plan and therefore do not need ERISA's substantive rights and protections. *Kemmerer v. ICI,* 842 F. Supp. at 144. This being so, " 'it would be absurd to deny such individuals the ability to enforce the terms of their plans in contract. . . . [I]t would be difficult to imagine what Top Hat participants would have the power to obtain through negotiation or otherwise — apparently not much more than illusory promises.' " *Id.* (quoting *Carr,* 816 F. Supp. at 1492).

In this regard, ICI concedes that a plan provision that the plan's terms cannot be revoked is controlling. *See* br. at 23 ("Ordinarily, plan sponsors have unfettered discretion to terminate pension plans, *unless the plan documents provide to the contrary.*"). This is just such a case. In determining the actual terms of the plan, "ERISA plans, like contracts, are to be construed as a whole." *Alexander v. Primerica Holdings, Inc.,* 967 F.2d 90, 93 (3d Cir. 1992). If the plan document is unambiguous, it can be construed as a matter of law.

The February 1, 1985 amendment to the plan, which we quote above, in no uncertain terms provides that a participant's election of a particular method of payment is binding and irrevocable, and that it shall be complied with. To conclude in the face of such language that ICI had unfettered discretion to disregard a participant's election would violate the plain meaning rule of contract interpretation. *See Duquesne Light Co. v. Westinghouse Elec. Corp.,* 66 F.3d 604, 613-16 (3d Cir. 1995) (discussing Pennsylvania common law rules of contract interpretation). ICI contends that the language is at the very least ambiguous, and it points to extrinsic evidence tending to show that "the purpose of the amendment was to avoid

the constructive receipt [tax] problem." Reply br. at 4.[5] Furthermore, ICI contends that it terminated the plan because of its desire to protect the participants' unfunded balances and because of its concern that the tax deferral aspects of the plan might not survive the scrutiny of the Internal Revenue Service. Yet these circumstances in no way can alter the contractual principles that lead to our conclusion that the terms of the plan bound ICI so that, in the absence of appellants' consent, ICI could not change its method of payment. The district court, therefore, correctly held that ICI violated the terms of the plan.

B. Damages

After granting summary judgment to the appellants on liability, the district court found that appellants had failed to prove that ICI's termination of the plan damaged them. Appellants characterized their claim for damages as falling under 29 U.S.C. § 1132(a)(1)(B), which permits plan participants to sue to recover benefits due them under the plan, and 29 U.S.C. § 1132(a)(3), which permits a participant to bring a civil action "to obtain . . . appropriate equitable relief . . . to enforce any provisions of this subchapter or the terms of the plan."

In addressing the parties' summary judgment motions, the district court rejected ICI's argument that the damages appellants sought constituted unrecoverable extracontractual damages. *Kemmerer v. ICI,* 842 F. Supp. at 146. ICI contends that the district court erred in that determination. The question ICI raises is difficult, requiring a close examination of precisely what damages appellants seek. In *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 144, 105 S.Ct. 3085, 3091 (1985), the Court noted that "the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan — § [1132(a)(1)(B)] says nothing about the recovery of extracontractual damages." And in *Mertens v.*

5. Constructive receipt in this context refers to a situation in which participants exercise such a degree of control over plan assets so as to be deemed to have received the deferred income. In such cases, the income deferred could be considered taxable immediately.

Hewitt Assocs., 113 S.Ct. 2071-72, 2068 (1993), the Court held that the provision for equitable relief in section 1132(a)(3) does not allow the recovery of monetary damages. In *In re Unisys Corp.*, 57 F.3d 1255, 1267-68 (3d Cir. 1995), we held that an individual participant may sue on his or her own behalf to recover equitable relief under section 1132(a)(3), and characterized reimbursements of back benefits as "remedies which are restitutionary in nature and thus equitable." *Id.* at 1269 (citing *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 238-39 (3d Cir. 1994)).

We are inclined to agree with ICI that appellants' claims are for extracontractual damages for purposes of section 1132(a)(1)(B) and monetary damages for purposes of section 1132(a)(3) and thus are not cognizable claims under ERISA. After all, the possibly adverse tax ramifications of the plan termination and the financial management fees which appellants may incur are possible *consequences* of the breach. On the other hand, the plan required ICI to pay money, and by its payment of their account balances to the appellants, ICI satisfied that obligation, though it did so prematurely. Further, it is difficult for us to see how such damages can be regarded as claims for equitable relief under section 1132(a)(3). But be that as it may, we decline to resolve such intricate issues of ERISA law because appellants failed at trial to prove they were damaged at all.[6]

In the first instance, we reject appellants' argument that the district court improperly placed the burden of proof on them. They rely on the proposition that when the existence of damage is clear, damages should not be denied simply because it is difficult to quantify the amount of loss. As a corollary, appellants argue that after they have proved they have been damaged, the district court cannot rely on burden of proof principles to reject their damages claims outright. For this proposition they rely on *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187 (1946). But in that Fair Labor Standards Act case, the Court assumed that "the employee

6. Appellants concede that they can advance damage claims only under ERISA.

has proved that he has performed work and has not been paid in accordance with the statute." *Id.* at 688, 66 S.Ct. at 1193. As the Court noted, "[t]he damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer." *Id.* Here, the opposite is true — the very existence of damages is in dispute. ICI presented persuasive evidence that appellants had not suffered any damages. When the very issue of damages is the subject of a good faith dispute, the principle that " 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts' " simply does not apply. *Id.* (quoting *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 250 (1931)).

Nor are we moved by appellants' contention that the burden should shift simply because this is an ERISA case. To be sure, courts have, in certain ERISA cases, placed the burden of proof on the trustee of the plan. But those cases involved first, the trustee's breach of fiduciary duty, and second, a definite loss. For instance, in *Martin v. Feilen*, 965 F.2d 660 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 979 (1993), the court held that "once the ERISA plaintiff has proved a breach of fiduciary duty and a prima facie case of loss to the plan or ill-gotten profit to the fiduciary, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by, or his profit was not attributable to, the breach of duty." *Id.* at 671. Neither of the prerequisites to burden-shifting is present here.

Turning to the evidence of damages, we are troubled by the fact that appellants, though claiming they were aggrieved by the plan termination, failed to request equitable relief requiring ICI to comply with the plan terms. Even though ICI advised them in November 1991 that it was changing the distribution schedule, they brought this action almost one year later, and only after ICI made one payment to them, and they filed a motion for summary judgment only after ICI made two of the accelerated payments. Yet section 1132(a)(3) explicitly authorizes participants to bring civil actions "to enjoin any act . . . which violates . . . the terms of the plan" and "to obtain . . . equitable relief . . . to enforce . . . the terms of the plan."

Surely, if appellants really felt that ICI had injured them, they could have rejected the accelerated payments and sought injunctive relief enforcing the terms of the plan. Given the circumstances, it seems obvious that appellants sought to play a no-lose game — trying to capitalize on the freed-up funds but claiming damages based on utterly speculative projections as to the financial consequences had the plan not been terminated.

Indeed, appellants' projections of damages at the trial were so speculative as to be unascertainable. First, they contended that they suffered tax-related losses because they were forced immediately to pay taxes on the accelerated payments to them and thereby forgo the benefits of tax deferral. Standing alone there would be force to this argument because ordinarily from a taxpayer's viewpoint it is advantageous to defer the payment of taxes. Yet the existence of such damages depends in part on what the tax rate will be at any given time and thus is speculative. And, as ICI properly points out, by virtue of the plan termination the appellants' account balances were taxed at a much lower rate than would have been the case had payments been made several years later. Furthermore the tax consequences of the accelerated payments were simply part of a larger picture including investment rates of return which the district court concluded did not establish that appellants had suffered or would suffer any financial loss as a result of the acceleration of payments.

Second, the appellants contended that they incurred management fees and transactions costs as a result of the breach. But ICI presented evidence that appellants "can replicate the investment options under [the] DEC without incurring material transaction costs." Op. at 6. The district court credited this testimony and concluded that "I cannot find . . . that it is more likely true than not that plaintiffs will now incur either material transactions costs or management fees." Op. at 6-7. The district court's finding is certainly supported by the record.

Most significantly, appellants' expert did not take into account the risk involved in keeping money in an unfunded plan. The district court pointed out that "[a]ny evaluation of one's interest in an unfunded plan must . . . give some consid-

eration to the fact that there is a risk to the participant that there will be no funds and the value of his interest in the plan should be adjusted to reflect that risk." Op. at 6. The failure to take the risk into account not only called all of appellants' projections into question, but is itself a reason for denying damages because a conclusion that they were damaged would rest on insupportable speculation.[7] In light of all of these factors, we cannot say that the district court's conclusion that appellants failed to prove that they were damaged was clearly erroneous. *Oberti v. Board of Educ.*, 995 F.2d 1204, 1220 (3d Cir. 1993).[8] Thus, we cannot find that they were entitled to relief in this case.[9]

Conclusion

For the reasons detailed above, we will affirm the district court's judgment of December 23, 1994, in favor of ICI and its order of January 5, 1994, granting appellants summary judgment on liability, and we will dismiss as moot ICI's appeal from the order of January 5, 1994, to the extent that the order denied ICI summary judgment on damages.

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Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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7. Thus, we reject appellants' argument that the district court failed to make adequate findings.

8. The conclusion we expressed above that ICI's concern about the security of the participants' accounts in the DEC plan did not justify its termination of the plan, does not mean that the security factor cannot be considered in a damages calculation.

9. We realize that in some situations a wronged plaintiff may recover nominal damages without proof of actual injury. *See e.g., Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1054 (1978). We see no reason, however, to apply that principle here as we do not regard the right which appellants seek to vindicate as worthy of such special protection.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-1071 and 95-1098

JOHN L. KEMMERER; JAMES H. JORDAN,
Appellants in No. 95-1071

v.

ICI AMERICAS INC.

JOHN L. KEMMERER; JAMES H. JORDAN

v.

ICI AMERICAS INC.,
Appellant in No. 95-1098

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 92-5986)

Present: Greenberg, Lewis, and Rosenn, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on October 11, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 23, 1994 in favor of ICI Americas, Inc. ("ICI"), and the judgment entered January 5, 1994 granting appellants summary judgment on liability, be, and the same are hereby affirmed. ICI's appeal from the order of

January 5, 1994 is hereby moot to the extent that the order denied ICI summary judgment on damages. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: November 17, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES H. JORDAN and JOHN L. KEMMERER, *Plaintiffs,*	:	CIVIL ACTION
v.	:	Filed December 22, 1994
ICI AMERICAS INC., now known as ZENECA, INC., *Defendant.*	:	NO. 92-5986

MEMORANDUM

BUCKWALTER, J. December 22, 1994

I. INTRODUCTION

By Memorandum and Order dated January 4, 1994, I found that plaintiffs could enforce the terms of their Deferred Executive Compensation Plans (DEC) under ERISA and federal common law principles of contract, and specifically that plaintiffs could enforce the repayment schedule under their DEC's based on the explicit terms of the plan at issue.

Each plaintiff, prior to his retirement, had selected a repayment schedule of his DEC benefits. Jordan had elected to have his funds paid in specific annual amounts until the year 2007, while Kemmerer had elected to have his account balance distributed in a specific amount from the date he retired until such time as his account was exhausted.

On December 31, 1991, the DEC's were terminated, after notice was sent to plaintiffs that their account balances would be distributed in three equal installments in January 1992, January 1993 and January 1994. Over the payout period their account balances were credited with interest at an annual rate of 10%.

On the date the DEC's were terminated, Jordan's balance was $4,674,438.86; Kemmerer's $771,621.00.

The above terminations and the resulting acceleration of distribution form the basis of the present dispute, which, in

essence, is: Did plaintiffs gain or lose economic benefits as a result of the acceleration of DEC benefits?

II. BURDEN OF PROOF

In my analysis of the liability issues (see Memorandum of January 4, 1994), I concluded that defendant was liable to plaintiffs because it breached the contract (the DEC), as opposed to liability based upon a breach of fiduciary duty. Both parties have briefed the issue of burden of proof. I believe that defendant's discussion in that regard is correct (see Defendant's Post Trial Brief, pp. 7-9). The plaintiffs have the burden of proving by a preponderance of the evidence what damages resulted from the breach of contract.

A hearing was held beginning on October 11, 1994 and the parties, by agreement, filed their respective post-trial briefs on December 8, 1994.

III. FINDINGS OF FACT

The DEC was unfunded. Participants in the DEC such as the plaintiffs were allowed to track the investments in a separately funded Deferred Compensation Plan (DCP) .

A decision was made to terminate the DEC. This decision was in part motivated by concerns about the security of participants in the DEC, which concerns increased in mid 1991 when rumors of a hostile takeover of defendant were reported. Terminating the plan and fully paying DEC participants provides the greatest protection against any future happenings which would render defendant incapable of making payments under the DEC.

As referred to in the introduction, the DEC was terminated and plaintiffs have now received the balance of their accounts (payouts). Plaintiffs contend that their payouts were insufficient when reinvested to reproduce the benefits of the payout schedule under the DEC agreement.

Their expert witness, called to support their contention, was Robert J. Doyle, Jr. His testimony was offered to calculate the loss of benefits each of the plaintiffs suffered as a result of the DEC termination. In reaching his numbers relative to the

foregoing, Doyle constructed a model, which he contended used the same investment portfolio to determine plaintiff's earnings both within the DEC plan had it continued, as well as from the DEC plan payouts that had in fact been made. In other words, the model sought to show the position plaintiffs would have attained if defendant had not terminated the plan and what amount they each need from defendant to reproduce the benefits under the original payout schedule.

Doyle testified as to the rates of return to be used in the model, transaction costs and management fees, the loss of tax leverage benefits, and the loss of elimination or lessening of tax and local taxation benefits. Under his theories, the total additional amount necessary to have been paid Kemmerer on December 31, 1991 to enable him to reproduce the benefits of the DEC plan was $385,660. As to Jordan, the total additional amount necessary as of December 31, 1991 was $1,527,195.

The defendant has four major areas of dispute offered by way of its expert witnesses, Professor Jeremy J. Siegel and Bertram J. Schaeffer, Esquire. Obviously, the rates of return used in the Doyle model are going to significantly affect the ultimate figures arrived at in determining whether a loss was sustained by either plaintiff as a result of the payouts.

As appeared from the testimony, the major disagreement between Doyle and Siegel was in the rate of return projected for equities. This difference is quite important, especially in light of the experts' disagreement on asset allocation which I will discuss later.

Suffice it to say that plaintiffs' evidence relative to the rate of return for equities does not show that it is more likely true than not that a 12.5% rate of return will occur over the relevant time period in this case, as opposed to Professor Siegel's projection of 8.8%. As a fact finder, based upon the respective backgrounds of Doyle and Siegel, I determine that Siegel's testimony was entitled to greater weight.

Asset allocation is the second part of the model upon which the experts disagree significantly. For Jordan, Doyle assumed an asset allocation of 80% invested in equities and 20% in fixed income. For Kemmerer, the allocation is 72%

equities, 28% fixed income. The composite long term portfolio rate of return for Jordan, according to Doyle, is 11.42%; for Kemmerer, 11.24%.

Schaeffer has a different set of figures. For Jordan, his asset allocation is 29% cash, 41% fixed income and 30% equities. Using Siegel's rate of return, the long term portfolio rate of return for Jordan is 6.96%. Kemmerer's asset allocation would be 60% fixed income and 40% equities with a 7.72% rate of return.

Having considered the extremely well-presented arguments and counter-arguments on each side of this issue of asset allocation, I find the weight of the expert witnesses' testimony to be equal. That is, for each argument that the allocation would be one way, there is an equally good one that it would be the other way.

The third major area of dispute between plaintiffs and defendant have to do with the so called risk factor. According to Siegel, in attempting to value the balances which plaintiffs would have had if the DEC had not been terminated, one factor that must be considered and analyzed is the risk of default. As Siegel explained, there are two layers of default that DEC participants are subject to. First is the risk of their own investments, and second is the risk of the fact that all of the accumulations were not funded. As Siegel testified (Volume 7, p. 83):

> "They (accumulations in DEC) were general liabilities of the firm and if the firm ran into financial problems and could not pay those liabilities in a timely way, then the DEC plan participants were subject to that risk."

Plaintiffs' expert did not consider the risk factor in his analysis. I think that this is a mistake. Any evaluation of one's interest in an unfunded plan must, it seems to me, give some consideration to the fact that there is a risk to the participant that there will be no funds and the value of his interest in the plan should be adjusted to reflect that risk. That is what Siegel did in assessing a risk premium of 2.6% and incorporating that figure into the model representing plaintiffs' gain or loss.

The fourth significant area of disagreement had to do with plaintiffs' claim regarding material transactions costs or management fees. Whereas more than one-half of plaintiffs' damages fall into this category, defendant's position is that plaintiffs can replicate the investment options under DEC without incurring material transaction costs.

My analysis of this issue leads me to the same conclusion as the one I reached with the matter of asset allocation. Said in another way, I cannot find after careful consideration of all the evidence that it is more likely true than not that plaintiffs will now incur either material transactions costs or management fees. There is nothing in the evidence presented or the arguments made that give more weight to one side than the other.

IV. CONCLUSION

There are no material factual disputes in this case. Instead, I have had to determine plaintiffs' right to recovery based largely upon their expert versus the defendant's experts.

Plaintiffs have alleged substantial losses as a result of defendant's breach of contract. Defendant, on the other hand, alleges that plaintiffs will actually fare better financially because the DEC was terminated.

After reviewing the testimony of all the witnesses, I find that plaintiffs have failed to prove by a preponderance of the evidence that they have suffered or will suffer any financial loss as a result of the breach of contract. It is equally plausible that they will make money as a result of the early termination of the DEC.

Except with regard to the evidence on rate of return and risk factor which I found weigh in favor of the defendant's expert, I have found no issues which weigh in favor of either side. They are equally balanced.

Inasmuch as I have determined that the burden of proof is upon the plaintiffs, I must find in favor of the defendant.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES H. JORDAN and JOHN L. KEMMERER, *Plaintiffs,*	:	CIVIL ACTION
v.	:	Filed December 22, 1994
ICI AMERICAS INC., now known as ZENECA, INC., *Defendant.*	:	NO. 92-5986

ORDER

AND NOW, this 22nd day of December, 1994, on the issue of what lost benefits, if any, plaintiffs are entitled to as a result of defendant's breach of the Deferred Compensation Plan, I find in favor of defendant ICI Americas, Inc., now known as Zeneca, Inc., and against plaintiffs James H. Jordan and John L. Kemmerer, and award no lost benefits.

BY THE COURT:

/s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

Entered: 12-23-94
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-1071 and 95-1098

JOHN L. KEMMERER; JAMES H. JORDAN,
Appellants in No. 95-1071

v.

ICI AMERICAS INC.

JOHN L. KEMMERER; JAMES H. JORDAN

v.

ICI AMERICAS INC.,
Appellant in No. 95-1098

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 92-5986)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge,* and
BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE,
SAROKIN, and ROSENN, *Circuit Judges*

The petition for rehearing filed by the appellants, John L. Kemmerer and James H. Jordan, in the above captioned matters having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/
Circuit Judge

DATED: December 19, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN L. KEMMERER and JAMES H. JORDAN, *Plaintiff,*	:	CIVIL ACTION NO. 92-5986
v.	:	Filed January 4, 1994
ICI AMERICAS INC., *Defendant.*	:	

ORDER

AND NOW, this 4th day of January, 1994, upon consideration of both plaintiffs' and defendant's Motions for Summary Judgment and responses thereto, it is hereby ORDERED and DECREED that Defendant's Motion for Summary Judgment as to liability and damages is DENIED and Plaintiffs' Motion for Summary Judgment as to liability is GRANTED.

It is further ordered that Plaintiffs' Motion to Strike is DENIED as moot.

IT IS SO ORDERED.

BY THE COURT:

/s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

Entered: 1-5-94
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN L. KEMMERER and JAMES H. JORDAN, *Plaintiffs,*	:	CIVIL ACTION NO. 92-5986
v.	:	
ICI AMERICAS INC., *Defendant.*	:	
	:	Filed January 4, 1994

MEMORANDUM

BUCKWALTER, J. January 4, 1994

INTRODUCTION

Plaintiffs John L. Kemmerer ("Kemmerer") and James H. Jordan ("Jordan") brought this claim against defendant ICI Americas, Inc. ("ICI") to enforce the terms of their unfunded executive deferred compensation plans. Specifically, plaintiffs seek to enforce the repayment schedule they selected under the plans. They also seek damages caused by defendant's failure to follow the payout schedule they selected under the plans. Currently before this Court are cross motions for summary judgment filed by both parties. Defendant moved for summary judgment on the issue of liability and on the issue of damages. Plaintiffs moved for summary judgment on the issue of liability. For the following reasons this Court grants summary judgment for the plaintiffs.

STATEMENT OF FACTS

The facts in this case are undisputed and thus, this case is ripe for summary judgment.[1] Plaintiffs in this case are former

1. The factual narrative was taken from the facts submitted by both parties. There was no substantial difference between the parties concerning the facts at issue in this opinion.

high level executives of ICI. During the 1970's ICI offered certain executives an opportunity to participate in two different deferred compensation plans.

The first arrangement was called the Deferred Compensation Agreement ("DCA Plan"). This plan was adopted in connection with the merger and acquisition of Atlas Chemical Industries, Inc. by ICI. The participants in the plan, who were former managers and executives of Atlas, agreed to surrender their Atlas stock options in exchange for ICI's promise to maintain an unfunded deferred compensation account equalling the value of the surrendered stock options.

The DCA was amended on February 1, 1985. Participants were given the option of electing a repayment method for their deferred compensation. The 1985 plan stated:

> Amounts deferred under this agreement shall be paid to Optionee commencing January 15 of the year following the year of his separation from service in five percentage installments . . . unless, prior to separation from service the Optionee files a written notice with the Secretary of Company, ("Secretary") requesting a different form of distribution. Such notice shall be treated as an election by the Optionee to receive payment by the method requested. The method of distribution requested shall be irrevocable after the close of business on the date of Optionee's separation from service.

DCA 1985 ¶ 7(a), Plaintiffs' Statement of Undisputed Facts, Exhibit 3.

In December 1974, ICI offered certain employees another type of deferred compensation plan called the Executive Supplemental Retirement Plan ("ESRP"). The ESRP required participants to annually notify the company whether and in what amounts they wished to defer their compensation for the following year and it provided that each choice was irrevocable. ESRP 1974 ¶ 1, Plaintiffs' Statement of Undisputed Facts, Exhibit 5.

On December 31, 1984, the ESRP was amended and it included the same exact clause allowing participants to select

a method of distribution for their deferred compensation as the DCA Plan of 1985. ESRP 1984 ¶ 4, Plaintiffs' Statement of Undisputed Facts, Exhibit 7.

Participants in the DCA and the ESRP plans, collectively referred to as the Deferred Executive Compensation Plan ("DEC Plan"), were permitted to defer income and accumulate investment returns on a tax deferred basis.[2] The DEC plan (ESRP and DCA) was unfunded and thus, investment returns were accomplished by allowing participants to "shadow" or "track" the investment portfolios that were available in a separate Deferred Compensation Plan (DCP).

The separate DCP Plan, developed by Atlas in 1958, was a funded plan that permitted participants to defer portions of their income and it required ICI to make actual contributions to the plan equal to the amounts deferred by the participants. The money was then invested by the company based on the various investment options selected by participants. The accounts of DEC participants were credited with amounts they would have received had their deferred compensation actually been invested pursuant to their shadow instructions. Since the unfunded DEC investment returns merely shadowed the funded DCP investments and were only credited to the participants' accounts, the post-retirement distributions had to be paid from the general assets of ICI as opposed to an investment trust fund like the DCP.

Prior to their retirement, both plaintiffs, in accordance with the DEC Plan provisions, selected a method for distribution of their deferred compensation after retirement. Jordan elected to have his DEC benefits paid in specific annual amounts until the year 2007. Kemmerer elected to have his plan balance distributed in fixed annual amounts until such time as his account balance would be exhausted. Plaintiffs Jordan and Kemmerer retired in 1986 and 1989 respectively. While ICI did begin to pay plaintiffs in accordance with the distribution methods selected, in 1991 ICI decided to cease

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2. Plaintiff Jordan was a participant of the DCA and the ESRP plans. Plaintiff Kemmerer participated in the ESRP, but he did not begin until 1985.

payment by the methods selected and instead, advised plaintiffs that the remainder of their account balances would be paid in three lump sum installments in January 1992, January 1993 and January 1994.

Defendant ICI has made the first two payments and plaintiffs brought this suit claiming they have lost benefits under the DEC Plan due to the increased tax liability resulting from distribution of the compensation in lump sums. Thus, plaintiffs ask this Court to enforce the repayment method for plaintiffs deferred compensation under the DEC Plan and to grant plaintiffs damages for defendant's breach of the terms of the plan.

DISCUSSION

I. Enforcement of Unfunded Pension Plans Under ERISA and the Applicability of Federal Common Law

The DEC plan at issue in this case is an executive deferred compensation plan that is generally referred to as a Top Hat plan. *Miller v. Eichleay Engineers, Inc.*, 886 F.2d 30, 34 n. 8 (3d Cir. 1989). Top Hat plans are "employee benefit plans" within the meaning of ERISA. *Pane v. RCA Corp.*, 868 F.2d 631, 635 (3d Cir. 1989). These plans are unfunded and maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. *Id.*

ERISA provides its maximum statutory protection to funded pension benefit plans by making them subject to elaborate accrual, vesting and funding requirements. Subchapter I of ERISA deals with "Protection of Employee Benefit Rights" and this is the subchapter that governs the plan in this case. 29 U.S.C. §§ 1001-1145. This subchapter is divided into Subtitle A and B. Subtitle B (Regulatory Provisions) is divided into five parts dealing with reporting and disclosure (Part 1 §§ 1021-31), participation and vesting (Part 2 §§ 1051-61), funding (Part 3 §§ 1081-86), fiduciary responsibility (Part 4 §§ 1101-14) and administration and enforcement (Part 5 §§ 1131-1145).

Executive deferred compensation plans are subject to none of the substantive requirements under ERISA in Parts 1-4 of Subtitle B, of Subchapter I. *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 30-31 (3d Cir. 1985); *Miller*, 886 F.2d at 34 n. 8. Nonetheless, these types of plans are subject to the enforcement provisions of ERISA in 29 U.S.C. § 1132(a).

In *Barrowclough*, which involved an unfunded executive deferred compensation plan similar to the one in this case, the court found that the plan participants could sue under ERISA to enforce the terms of their plan. 752 F.2d at 926-27. The plan gave certain executives an option to defer as much as 25% of their income to reduce their tax liability. The amount deferred was credited to an account and was to be paid after retirement, death, disability or termination of the executive. William Barrowclough sued the company under ERISA, 29 U.S.C. § 1132(a), for breaching the terms of his plan when the employer refused to pay plaintiff any of his deferred income. One of the central questions addressed by the court was whether plaintiff had a cause of action to enforce the terms of the unfunded deferred compensation plan even though the plan was exempt from the substantive provisions of ERISA.

After a detailed examination of the statutory language, structure and legislative history of ERISA, the court found that Mr. Barrowclough had a federal cause of action under ERISA's enforcement provisions, Part 5 of Subtitle B, of Subchapter I[3], to enforce the terms of his unfunded deferred compensation plan despite the fact that the plan was not subject to the substantive provisions of Parts 1-4 of Subtitle B, of Subchapter I. *Barrowclough*, 752 F.2d at 929-30. Parts 2-4 of Subtitle B have explicit language exempting plans that are "unfunded and maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. §§ 1051(2), 1081(a)(3) & 1101(a)(1). Regulations promulgated by the Secretary of Labor also make it clear that unfunded plans are not subject to the requirements of Part 1. Thus,

3. 29 U.S.C. §1132(a).

Congress included explicit exemptions in the provisions it intended not to apply to unfunded plans.

The *Barrowclough* court concluded from the legislative history that Congress did not intend to exclude unfunded plans from ERISA entirely. 752 F.2d at 930. There is no exemption in Part 5, 29 U.S.C. 1132(a), for unfunded deferred compensation plans. Consequently, although a participant in an unfunded pension plan cannot bring claims for violations of the substantive provisions of ERISA, a participant can sue to enforce the terms of its unfunded plan.

Since the substantive law of ERISA is not applicable in cases involving unfunded deferred compensation plans, courts must look to another source of law as a basis for enforcing such plans. The *Barrowclough* court found that Congress intended that federal common law developed under ERISA would be the applicable law for actions enforcing these types of plans. 752 F.2d at 936-37. Thus, the court ruled that participants of unfunded deferred compensation plans have a federal cause of action under ERISA to enforce the terms of their plans based on federal common law. *Id.*

The *Barrowclough* court, however, did not reach the issue of whether federal common law principles of unilateral contract could apply to a Top Hat plan to enforce a repayment schedule in the plan. This is the issue now before this Court.

II. Top Hat Plans as Unilateral Contracts

This is a case of first impression in the Eastern District of Pennsylvania, but this exact issue was recently faced by the Northern District of California. *See, Carr v. First Nationwide Bank,* 816 F.Supp. 1476 (N.D. Cal. 1993). I find the *Carr* decision persuasive and this Court will follow the reasoning in that case.

Carr involved very similar facts to the present case. Plaintiffs in *Carr* were former executives of First Nationwide Bank and they sued to enforce contractual rights found in their deferred compensation plan pursuant to Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1132(a). Specifically, plaintiffs sought a declaration that defendant must repay their

deferred compensation under the interest formulae in their plan and the payment schedule elected in plaintiffs' deferral notices under the plan. Plaintiffs' worked for the Bank until 1989. The Bank amended the compensation plan in 1992 and changed the repayment schedule that the plaintiffs had selected and it changed the interest formulae under the plan.

Defendant had been paying plaintiffs in accordance with their elected payout schedule until 1992 when defendant decided to pay the remainder in five lump sum installments. Plaintiffs' sought an injunction stopping defendant from violating the repayment schedule and a declaratory judgment ordering defendant to repay the money according to the terms of the plan. Alternatively, plaintiffs sought contract damages for violation of the plan. The court framed the issue as follows:

> This is a case of first impression under ERISA. The question presented is whether the participants in an executive deferred compensation, or "Top Hat", plan may invoke a federal common law theory of unilateral contract to prevent the plan sponsor from amending the plan to the participants' detriment after the participants have become entitled to repayment under the terms of the plan.

The issue presented in this case is identical to the one addressed in *Carr.*

Plaintiffs in *Carr* argued that under the federal common law of contracts applicable to ERISA plans, the 1992 plan amendments violated their rights under a series of unilateral contracts formed when they filed deferral notices pursuant to the provisions of the plan. 816 F.Supp. at 1485. Moreover, they argued that the expressly reserved power to amend in the Plan did not include the power to change the interest and repayment terms as to income deferred prior to the amendment. *Id* at 1492-93.

Relying on *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985), the court held that the principles of federal common law govern the enforcement of Top Hat plans. *Carr,* 816 F.Supp. at 1487. The court went on to decide that unilateral contract principles that have been applied to

qualified or funded pension plans apply to Top Hat plans, which are unfunded and not qualified.

It is well settled that pension benefit plans are unilateral contracts which employees accept by performance and the plan may not be unilaterally amended or modified retroactively by the sponsor. *Kay v. Thrift & Profit Sharing Plan,* 780 F.Supp 1447, 1457 (E.D. Pa. 1991); *Hardy v. H.K. Porter Co.,* 417 F.Supp. 1175, 1183 (E.D. Pa. 1976); *Pratt v. Petroleum Prod. Mngmt. Employee Savings Plan,* 920 F.2d 651, 661 (10th Cir. 1990); *Morales v. Plaxall, Inc.,* 541 F.Supp. 1387, 1391 (E.D.N.Y. 1982).

In *Kay,* the court explicitly followed the Tenth Circuit's holding in *Pratt* that a "pension plan is a unilateral contract which creates a vested right in the employees who accept the offer by continuing in employment the requisite number of years." *Kay,* 780 F.Supp. at 1458 (quoting, *Pratt,* 920 F.2d at 661). Although the above cases all involved funded pension plans and the substantive provisions of ERISA, it is clear from the Pratt case and reaffirmed by *Carr* that this conclusion was not based on any ERISA provisions. *Carr,* 816 F.Supp. at 1488; *Pratt,* 920 F.2d at 658-61.

The *Pratt* court decided first that the pension plan was a unilateral contract and therefore unilateral amendment of the plan to defeat plaintiff's fully vested rights was not allowed. 920 F.2d at 661. The court also found that such an amendment violated the substantive provisions of ERISA, but that finding was clearly not the basis for concluding that pension plans are unilateral contracts. *Id.*

The *Carr* court found that Top Hat plans resemble employee pension benefit plans as defined in 29 U.S.C. § 1002(2)(A)(ii). That section defines an employee pension benefit plan or a pension plan as:

> "any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program (i) provides retirement income to employees, or (ii) results in a deferral of

> income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating benefits under the plan or the method of distributing benefits from the plan.

It is clear that the DEC Plan (DCA and ESRP plans) in this case falls within the definition stated above. Both plans in this case provided for a deferral of income until termination and beyond. Moreover, these plans appear to provide retirement income to the plaintiffs. To the extent Top Hat plans resemble or can be considered pension benefit plans, they too should be considered unilateral contracts.

III. Federal Common Law of Contract Under ERISA

Federal common law of contract under ERISA mandates that the intended meaning of the parties should be determined, if possible, from the explicit language of the plan. *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 93 (3d Cir. 1992). Moreover, if the plan language of the plan is unambiguous, its natural meaning is presumed to be conclusive of the parties' intent. *Carr*, 816 F.Supp. at 1493 (citing, *Bellino v. Schlumberger Technologies, Inc.*, 944 F.2d 26, 29-30 (1st Cir. 1991). In light of the above principles, the *Carr* court stated:

> "the policies embodied in ERISA do not prohibit Top Hat plan participants from enforcing their plans as a unilateral contracts which may not be amended without their consent, *so long as the claimed contractual rights arise from the terms of the written top hat plan documents.*"

816 F.Supp. at 1488.[4] (emphasis added).

The plan should be construed as a whole, and the specific language of each provision should be interpreted in the con-

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4. The court stated that it reached its decision with "no small degree of reluctance." However, the court's reluctance was based on the fact that, under the plaintiffs' control, the bank was left in an inferior financial condition. Nonetheless, the court felt compelled to rule in favor of plaintiffs in light of ERISA law and policy and the terms of the plan. *Carr*, 816 F.Supp. at 1486.

text of the whole. *Alexander*, 967 F.2d at 93. The provisions of an ERISA plan should be construed so as to render none nugatory and avoid illusory promises. *Carr*, 816 F.Supp. at 1493 (citations omitted). An interpretation which gives a reasonable, lawful and effective meaning to all the terms is preferred to one which leaves any part unreasonable or of no effect. *Musto v. American General Corp.*, 861 F.2d 897, 906 (6th Cir. 1988); Res 2d. of Contracts § 203.

Defendant argued that they had the right to terminate the plan at any time and distribute the funds in lump sums. However, there is no such reservation of power in the plan and this court has already concluded that the DEC plans are unilateral contracts whose rights accrued upon termination of employment.

The Defendant in *Carr* argued that since top hat plans are granted even less protection than welfare plans and since amendment of these plans is not subject to fiduciary and vesting requirements, unilateral contract principles should not apply to prevent a defendant from amending an unfunded pension plan.[5] This argument was rejected by the court. 816 F.Supp. at 1489. First, the rule that welfare plans are freely amendable means only that the amendment or termination of such plans is not governed by fiduciary duty provisions of ERISA. Second, although amendment of welfare benefit plans is not subject to the vesting requirements of ERISA, it does not give employers blanket authority to amend plans where the plan can be interpreted to provide that benefits are contractually vested or accrued, even if the plan includes an explicit reserved power to amend. *Id.* Thus, although welfare plans are not subject to ERISA's vesting rules, the terms of a plan can provide for vesting. *Id.*

The plans in this case are not welfare benefit plans, but the reasoning applies equally in this case. Although unfunded pension plans are not subject to vesting requirements, they can provide for vesting in the plan itself. This conclusion is

5. Welfare benefit plans, while subject to some disclosure and fiduciary duty requirements, are exempt from the other more stringent requirements of funded pension plans. *See*, 29 U.S.C. §§ 1021-31, 1101-1114.

supported by a Department of Labor's opinion on why Congress exempted Top Hat plans from the substantive provisions of ERISA.[6] The Department of Labor stated:

> Congress recognized that certain individuals, by the virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protection of Title I.

Carr, 816 F.Supp. at 1491 (quoting, U.S. Dep't of Labor ERISA Op. 90-14A). The *Carr* court found:

> To the extent that Congress relied on Top Hat participants' power to influence the contents of their plans in denying them the substantive protection of ERISA, it would be absurd to deny such individuals the ability to enforce the terms of their plans in contract . . . it would be difficult to imagine what Top Hat participants would have the power to obtain through negotiation or otherwise — apparently not much more than illusory promises.

816 F.Supp. at 1492. Thus, the court concluded that Top Hat participants may enforce the terms of their plans under federal common law principles of unilateral contract as long as the asserted rights are found in the plan documents and these rights cannot be amended unilaterally after participants become entitled to repayment under the terms of the plan.

IV. Contractual Rights Under the DCA and ESRP Plans

With these principles in mind, this Court examined the plan documents in this case. Although the two plans in this case are substantially similar, I will address them separately at this juncture. Under the 1971 DCA plan, as amended, participants could accept the company's offer by (1) Consent to can-

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6. In interpreting ERISA and other statutes, a court may look not only to the legislative history, but also to the views of the agency charged with administering it. *Carr*, 816 F. Supp. at 1491 (citing, *Winterrowd v. David Freedman and Co., Inc.* 724 F.2d 823, 825 (9th Cir. 1984).

cellation of the Company's obligations under the previous stock option plan and (2) Continuing to work for the Company. Under the ESRP plan, participants accepted by filing with ICI a notice of whether and in what amounts they wished to be withheld from their compensation for the following year. The plan in the *Carr* case contained the same requirement regarding deferral notices as the ESRP Plan. 816 F.Supp. at 1492. The court found that:

> Each time plaintiffs submitted deferral notices as provided in the version of the plan then in existence, plaintiffs accepted the offer embodied in the terms of the plan by beginning performance. Unilateral contracts were then formed, based on the contents of the plan and the deferral notices on the dates the notices were submitted. By the time each plaintiff had terminated his employment with the Bank for reasons other than cause he had completed the required performance under the terms of the plan.

Id; See, Res. 2d Contracts §§ 45(1), 50(2).[7]

Moreover, under both plans, participants had to give written notice of their repayment schedule to the Secretary of the Company prior to separation with the Company. Once Kemmerer and Jordan each filed their repayment selections with the company prior to their retirement, performance was complete and a binding contract was formed. Thus, this Court finds that contracts were formed and certain rights accrued to the plaintiffs upon completion of the above acts which constituted performance and acceptance.[8]

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7. The court also concluded that even if the plan were deemed a bilateral or executory contract, to be accepted by a return promise, plaintiffs' submission of deferral notices was a return promise. *Carr*, 816 F.Supp. at 1492, n. 11; *See*, Res. 2d Contracts § 62(2). It appears that the DCA plan could be considered a bilateral contract, since the participants accepted by agreeing to relinquish their stock options from Atlas in return for deferred income with ICI. Regardless of which theory is applied, the result is still that this Court must examine the terms of the plan to determine if ICI is obligated to repay plaintiffs money according to their repayment schedule.

8. A unilateral contract is formed by an offer, the consideration for which is the performance of an act or forbearance to act. *See*, Restatement (Second) of Contracts §§ 30, 71 (1981).

Specifically, both ¶ 7(a) of the DCA Plan and ¶ 4 of the ESRP Plan clearly set out the method of payment for participants' deferred compensation. The clause states:

> amounts deferred . . . *shall be paid* . . . in five percentage installments . . . *unless* . . . the Optionee files a written notice with the Secretary of the Company . . ., requesting a different form of distribution. *Such notice shall be treated as an election to receive payment in the form requested* . . . (emphasis added)

There is nothing ambiguous about this language. The plain meaning of this clause is that the deferred income will be paid in five percentage installments unless plaintiff selected a different method, in which case, the money will be paid by the method selected by the plaintiff.

Just as in *Carr*, these plans contain explicit language regarding how participants may defer compensation and shall be paid such compensation. In fact, this case is even more compelling than *Carr*. In *Carr*, the pension plan contained an explicit provision reserving the right of the employer to terminate and/or amend the plan at any time. 816 F.Supp. at 1493.[9] There is no such explicit reservation of the right to terminate or amend the plan in this case. Thus, there is no problem of construing two contradictory clauses in this case. Although the employer had reserved the power to amend the plan, the court

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9. ICI attempts to distinguish *Carr* by claiming there is a difference between termination of a plan and amendment of the plan. Their argument is not persuasive. The *Carr* court made no such distinction. Even though in *Carr* the plan changes were labelled amendments, they had the same effect as a plan termination. Under either label, the defendants in both cases unilaterally altered plaintiffs' repayment schedule in direct violation of the plans after the right to such repayment had accrued under the plan. Defendant's argument that they had the power to terminate the plan at any time is simply rejected by this Court's conclusion that there was a unilateral contract formed in this case and upon completion of performance, the plaintiffs became entitled to repayment based on the distribution schedule they selected.

concluded that the more specific distribution clause and interest formulae clause took precedence.[10] *Id.* The *Carr* court aptly stated:

> if the plan means what defendants contend, then the Bank reserved to itself unfettered discretion to decide that it would not honor any of the specific promises in the Plan regarding how payments shall be made . . . This is a result which basic principles of ERISA federal contract law will not allow.

Carr, 816 F.Supp. at 1494. This statement applies equally to the current case. Plaintiffs completed performance prior to the attempted changes by the ICI and therefore, the employer became contractually obligated to repay the deferred compensation in accordance with the interest and repayment terms of the plan in effect at the time of completed performance.

Implying a right to terminate an ERISA plan and alter accrued contract rights without any explicit provision to that effect would nullify the method of payment clauses in the DEC plans. This would be in direct violation of established federal common law principles of contract interpretation established under ERISA. This court will not find a right to amend or terminate this plan where none exists in the language of the contract that would have the effect of rendering an explicit contract provision nugatory and illusory.

V. Damages

Defendant argues that plaintiff's are seeking extra-contractual damages and that these damages are not recoverable under ERISA. While it is true that extra-contractual damages are not recoverable under ERISA, plaintiffs' damages are not extracontractual. One of the principal cases relied on by defendant is *Harsch v. Eisenberg*, 956 F.2d 651 (7th Cir.), *cert denied*, ____ U.S. ____, 113 S.Ct. 61 (1992). Plaintiffs in *Harsch* argued that they were attempting to enforce their

10. The power to amend the plan was also limited by the phrase "without canceling, reducing or altering any outstanding awards thereunder." *Carr*, 816 F.Supp. at 1494.

rights under their pension plan to proper treatment by a plan fiduciary under 29 U.S.C. § 1104(a)(1). 956 F.2d at 655. Plaintiffs did not have an explicit contractual right to payment at any particular time, but the plan administrator had a fiduciary duty imposed by ERISA to process their claim and pay their benefits within a reasonable time. Consequently, plaintiffs' claim was not for a breach of any specific terms of payment in the plan. The court concluded that the "language of section 502(a)(1)(B) . . . appears to limit beneficiaries to *contractual* claims by providing only for actions *based upon or arising under the terms of the plan.*"[11] (emphasis added).

Plaintiffs' claims in this case arise under the terms of their plan. They are suing for lost benefits caused by defendant's breach of the deferred compensation plan. Plaintiffs' allegedly incurred greater tax liability based on defendant's lump sum payments and thus, they lost the benefit of their selected repayment schedule. Any other conclusion would nullify the enforceability of the repayment clause and make that promise illusory.

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11. The Seventh Circuit relied on *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085 (1985), to reach its conclusion. This case was limited to cases involving breaches of fiduciary duties and it involved a claim for emotional distress. Just as in *Harsch*, these claims did not arise under the terms of the plan and therefore, were considered extra-contractual damages.

CONCLUSION

Top Hat plans can be enforced under ERISA through application of federal common law principles of unilateral contract as long as the asserted contract rights are found in the terms of the plan. Thus, plaintiffs can enforce the terms of their Deferred Executive Compensation Plans under ERISA and federal common law principles of contract. Specifically, I find that plaintiffs can enforce the repayment schedule selected under their deferred compensation plans based on the explicit terms of the plans at issue.

An order follows.

Internal Memorandum

DATE: August 15, 1991

FROM: R. D. Marceluk

TO: W. C. Stricklin

ICI AMERICAS INC.
Wilmington, DE 19897
Employee Relations
Telephone (302) 886-8571
Rapifax (302) 886-5606

CC: S. Jackson
T. Hindmarch
J. W. Coleburn III

Re: DEC/DCA Analysis

As detailed in Attachments 1 and 2, the company is now committed to a series of cash payouts totalling $52,000,000 presuming 10% growth ($56,000,000 at 12%) over a ten-year period. Presuming no mortality, the cash balance at the end of ten years is projected at $30,000,000 ($40,000,000). A company-initiated payout would have a cash and tax effect to both the company and the participants.

Treasury has performed an analysis (Attachment 3) of the after-tax effect to both the company and participants. At ICIA's short term borrowing rate (5.5% after tax), the analysis can be summarized as follows:

10% Growth	Company (millions of dollars)	Participant (millions of dollars)
10-year payoff	30.8	30.6
3-year payoff	26.5	27.0
12% Growth		
10-year payoff	34.3	33.9
3-year payoff	27.3	27.8

As summarized below, the gains to the company for an accelerated payment exceeds the loss to the employee.

	Company Gain	Employee Loss
10%	$4.3M	$3.6M
12%	7.0M	6.1M

Given the desire of the company to expunge the liability, the gain of between $4.3M and $7.0M (after tax NPV) provides

ample negotiating room to offer a "buyout" arrangement (on an aggregate, not individual basis). The added protection offered to the participants in securing the cash should also assist in the acceptance of the offer.

Replacement Plan

It is desirable to continue a more conservative DEC as a protection for individuals against current taxation, and it is contractually required to continue a vehicle for those who do not elect an accelerated payout. The most significant concern, beyond the continued accrual on large historical balances, is the risk for substantial company expense if participants enjoy equity growth at a rate exceeding the corporation's ability to earn or cost to borrow.

For new contracts the future DEC will be restricted to non-equity fund(s). Existing contracts cannot be amended unilaterally; however, paragraph 3(f) of the agreement (Attachment 4) states that the "Company has the right to discontinue or substitute for the purpose of account adjustment any of the existing DCP portfolios". An aggressive position would interpret the above to include the right to *not* substitute, which would permit removal of the DCP equities being discontinued in January, 1992, *without* adding the new shadow accounts. This would limit DEC to Long Term Income, Insured Savings, ADR's, Portfolio A and expiring BAC accounts. An even more aggressive interpretation would allow the right to *discontinue* ADR's and Portfolio A, etc.

It is recommended that a dollar amount be authorized to entice the acceptance of the Company offer to accelerate payout, and that a determination be made regarding the aggressiveness of our position relative to future investment options.

RDM: dmp
Attachments 4
MRDM8151

Internal Memorandum

DATE: August 14, 1991

FROM: D. E. Blum

TO: S. Jackson

ICI AMERICAS INC.
Wilmington, DE 19897
Treasurers Department
Telephone (302) 886-8646
Fax No. (302) 886-2960

CC: T. W. Black
J. P. Brazzo
R. D. Marceluk

SUBJ: DEC/DCA PLAN EARLY TERMINATION (Revised)

A proposal has been put forth to accelerate the termination of the DEC/DCA retirement plan in order to reduce both administrative and financing costs. Rather than continuing the plan for its full term, an alternative payoff to the beneficiaries over three years is being considered.

If the three-year payout is financed with borrowings by ICI Americas, at an average interest rate of 9.0%, then the early termination is preferred. Although the payoff will cost $26.5m, the savings which would be achieved amounts to $4.3m (both figures are in after-tax present value terms). The participant would prefer the longer payout, however, his shortfall is only $3.6m on an after-tax present value basis.

The complete set of assumptions used to evaluate the financial aspects of this proposal include to following:

- The plan will terminate in 10 years. A lump-sum payment of any remaining balance will be paid at that time. The financial implications of extending the analysis beyond 10 years are negligible.
- Plan participants will earn 10% - 12% over this 10 year term. Nearly all participants are earning 16.2% in BAC 2 but will be faced with its expiration and an alternative long-term fixed income investment which earns only 8.25% at December 31. If the majority remain in the conservative, fixed option, but 40% switch to the higher returning equity choices (expected 14% return), an average yield exceeding 10% would be expected. Rising interest rates or stronger than expected equity performance will increase this yield.

- The cash flows used to project the company's obligation over the 10 year term are the actual payouts as required by the retirees' elections.
- The discount rates used to present value these cash flows are:

5.5% - ICIA's after-tax cost of borrowing, and
13.0% - the Group's after-tax cost of capital.

- The tax rates used for the company and for the beneficiaries are 38.5% and 36.3%, respectively, as provided by the Tax Dept.
- No active participants were included in this analysis.

The District Court and the Court of Appeals misapplied fundamental burden of proof principles and ignored the requirements of Rule 52(a)

Burden of Proof Principles

The district court held that "[t]he plaintiffs have the burden of proving by a preponderance of the evidence what damages resulted from the breach of contract", but did not apply the corollary principle that where the fact of damage is clear it is the wrongdoer who must bear the risk of the uncertainty which his own wrong has created. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 66 S.Ct. 1187, 1192-93 (1946); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265, 66 S.Ct. 574, 580 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-67, 51 S.Ct. 248, 250-51 (1931). The Court of Appeals affirmed on the mistaken assumption that "the very existence of damages", and not merely the amount thereof, was in dispute.

The *fact* of damage, however, had been established through ICI's own documents (43a-46a) prepared immediately before the premature termination. They showed that if the distributions to retired executives were made over a period of three years instead of, say, ten, ICI would save between $4,300,000 and $7,000,000 and *the retired executives would lose between $3,600,000 and $6,100,000,* depending on whether the composite return on the account balances in future years was assumed to be 10% or 12%.[1] The damage issue going into the trial, therefore, was not *whether* plaintiffs had been damaged by the loss of many years of tax deferral; it was whether the composite return on the account balances would have been 10%, 12%, or some other number, so that the *amount* of damages could be calculated. The *fact* of damage only became debatable by virtue of the erroneous conclusions of the Court of Appeals that this Court is now being asked to review and reverse: (i) that damage claims based on unknown future tax

1. Jordan's account balance was over 10% of the total. The total was approximately $46,000,000; Jordan s account balance was $4,674,438.86. See Transcript of October 13, 1994 and Defendant's Exhibit 36 (reproduced in the appendix below at 868a and 1837a, respectively).

rates are irredeemably speculative and (ii) that the "risk premium" concept could be applied to deflate or eliminate damages entirely.

Rule 52(a)

To determine the *amount* of damages resulting from the loss of the ability to defer taxes from 1992 through 2007, experts opined on what the composite rate of return would have been on investments petitioners would likely have chosen to shadow. Petitioners' expert testified that Jordan would have invested mostly in equities and that the composite return on all of his investments would have been 11.42%, within the 10%-12% range ICI itself had earlier assumed. ICI's expert, however, testified that Jordan would have invested mostly in fixed income and money market instruments on which the composite rate of return would have been only 6.96%. The trial judge found that the weight of the expert testimony on the investments plaintiffs would likely have chosen to shadow was exactly equal and made no finding at all on a composite rate of return, neither 11.42% *nor even 6.96%,* nor any number in between. He simply concluded that plaintiffs had failed to meet their burden of proof. His refusal to make any composite rate of return finding, even one that accepted ICI's assumptions, constituted an abandonment of the judicial obligation to decide, in clear violation of Fed.R.Civ.P. 52(a).[2]

Fed.R.Civ.P. 52(a) requires the trial court, sitting without a jury, to "find the facts specially and state separately its con-

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2. The failure of the trial judge to make the findings required by Fed.R.Civ.P. 52(a) was the lead argument in petitioners appeal to the Court of Appeals.

Both sides in this case understood that damages would be calculable only after the trial judge decided whether the composite rate of return on petitioners' account balances would have been 11.42% as opined by petitioners' expert, 6.96% as opined by ICI's expert, or some number in between. *Both* sides asked the Judge to make the appropriate findings (see Defendant s Amended Proposed Findings of Fact and Conclusions of Law Nos. 69-70, pp. 27-29). *Both* sides were ready, willing and able, if necessary, to do the necessary damage calculations themselves once the Judge made those subsidiary findings (see Transcript of October 20, 1994, reproduced in the appendix below at 1222a, and Plaintiffs' post-trial brief at 49-50), but he simply did not make them.

clusions of law thereon. . . ." In *H. Prang Trucking Co., Inc. v. Local Union No. 469,* 613 F.2d 1235 (3d Cir. 1980), the court made clear that subordinate factual foundations too "may not be left unarticulated". *Id.* at 1238 (citing *O'Neill v. United States,* 411 F.2d 139, 146 (3d Cir. 1969) and R. Aldisert, *The Judicial Process* 693-94 (1976)). Otherwise, as another Court of Appeals has said, "appellate review becomes an exercise in conjecture." *Belcon, Inc. v. Sherman Const. Co.,* 800 F.2d 1321, 1324 (4th Cir. 1986). See also *Hull v. U.S.,* 971 F.2d 1499, 1512-1513 (10th Cir. 1992), *cert. denied,* 507 U.S. 1030 (1993) (remanded to make findings explaining damage calculations pursuant to Fed.R.Civ.P. 52(a)); *Nemmers v. U.S.,* 795 F.2d 628, 634-636 (7th Cir. 1986) (same); *Touch v. Master Unit Die Products, Inc.,* 43 F.3d 754, 758-759 (1st Cir. 1995) ("We in no sense suggest which (if either) evidentiary proffer should be credited, but simply emphasize that appellate review is utterly impracticable when neither the conclusions of law which guided the district court ruling, nor the findings of fact essential to a principled decision under the applicable law, are discernible from its decision").

If a jury were instructed to make a subsidiary finding on the composite rate of return after hearing two experts testify to their respective 11.42% and 6.96% opinions and the reasons therefor, a jury either (a) would have found 11.42% or 6.96% or would have agreed upon some number in between, or (b) would have reported to the court that different jurors had different views on the subject and were unable to compose their differences. In the latter case a new trial would have been required. But the inability of a jury to come to an agreement regarding a subsidiary fact necessary to calculate damages would never be the basis for a determination that the plaintiff had not carried its burden of proof. The same is true here.

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No. 95-1511

In The

Supreme Court of the United States

October Term, 1995

JOHN L. KEMMERER and
JAMES L. JORDAN,

Petitioners,

v.

ICI AMERICAS INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 CORPORATE AFFILIATION STATEMENT

Respondent, which was previously known as ICI Americas Inc., changed its name to Zeneca Inc. during the pendency of this litigation. Respondent has two non-wholly owned subsidiaries, Corpus Christi Global Chemicals Company and Image Polymers Company. Zeneca Inc. is ultimately owned 100% by Zeneca Group PLC, a publicly-traded company.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent ICI Americas Inc. (referred to hereinafter as "ICI")[1] respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Third Circuit's opinion in this case.[2] The decision below is not inconsistent with existing federal law, nor does it reflect a split of authority among the Circuits.

COUNTERSTATEMENT OF THE CASE

This Counterstatement of the Case supplements Petitioners' Statement of the Case, which omits certain important facts.

Petitioners imply, as they did at the trial of this case, that ICI's purpose in terminating its Executive Deferred Compensation Plan ("the Plan") was to achieve an economic gain for ICI, in derogation of the rights and interests of Plan participants. The evidence and the District Court's findings were to the contrary.

The principal reason for the Plan termination was to protect participants from the risk of a default by ICI. In the months preceding the termination, ICI was the subject of a hostile takeover attempt. ICI's senior management

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[1] After the commencement of the litigation, ICI changed its name to Zeneca Inc. For purposes of convenience and consistency, Respondent is identified in this Brief as "ICI."

[2] The Third Circuit's opinion is reported at 70 F.3d 281. The opinions of the United States District Court for the Eastern District of Pennsylvania are unreported. ICI will reference these decisions by citing to Petitioners' Appendix.

recognized that some participants might lose some of the projected benefits of tax deferral as a result of the Plan termination, but they decided that these risks were outweighed by the desirability of distributing the account balances on an accelerated basis. The accelerated distributions protected Petitioners and others from the risk of continuing to participate in an unfunded plan at a time of great uncertainty. The District Court agreed that the decision to terminate the Plan

> was in part motivated by concerns about the security of participants in the [Plan], which concerns increased in mid 1991 when rumors of a hostile takeover of defendant were reported. Terminating the Plan and fully paying [Plan] participants provides the greatest protection against any future happenings which would render defendant incapable of making payments under the [Plan].

(Pet. App. 19a). The District Court did not identify any other reasons for the Plan termination.

More importantly, whatever potential tax and investment losses were contemplated before the Plan was terminated, several developments beginning in 1992 turned such potential losses into gains. First, personal income tax rates for wealthy Americans were raised substantially, effective January 1, 1993. Focusing on Petitioner James Jordan ("Jordan"), as Petitioners have done, reveals the dramatic impact of these changes. The Plan termination resulted in accelerated distributions to Jordan of roughly two-thirds of his account balance in 1991, at a time when the maximum personal income tax rate was thirty-one percent. Had Jordan remained a participant in the Plan,

taking gradual distributions through the year 2007 as he had originally elected, any distributions made after January 1, 1993 would have been taxed at a 39.6 percent rate.

Second, as a result of the Plan termination, the retired participants received a rate of return that substantially exceeded the returns that they would have received under the Plan. After the Plan was terminated, account balances were distributed in three roughly equal installments, beginning in January 1992 and ending in January 1994. During this two-year distribution period, participants were credited with a ten percent annual rate of return on their remaining account balances. Over the same period, however, the returns that would have been available under the Plan were substantially lower, due to low interest rates, and poor performance in the stock and bond markets. Jordan, for example, earned at least $250,000 more on his account balance during the two-year distribution period than he would have earned as a Plan participant.

After consideration was given to these developments, and after correcting flawed assumptions by Petitioners' experts about the rates of return that might have been achieved prospectively in the Plan, ICI's experts demonstrated that as a result of the Plan termination, Petitioners Jordan and Kemmerer achieved **economic gains** in the amounts of $478,000 and $43,966, respectively. Additionally, Petitioners received considerable benefits from the accelerated distributions which were not easily quantifiable, including increased investment liquidity, greater flexibility in estate planning, avoidance of the risk of default and an unlimited number of investment vehicles.

These factors, together with flaws in the model constructed by Petitioners' expert witnesses at trial, prompted the District Court to conclude that Petitioners had not established that they were damaged as a result of the Plan termination. It also explains why Petitioners were the only two of sixty-four retired Plan participants to seek judicial relief from the accelerated distributions.

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Case Does Not Present Issues Warranting The Grant Of Certiorari.

In seeking certiorari, Petitioners attempt to portray the Third Circuit's decision as resting on two narrow legal holdings: 1) whether "damages for the loss of the benefits of tax deferral [are] too speculative to be recoverable because they necessarily depend on unpredictable future tax rates"; and 2) whether "such damages [are] too speculative to be recoverable because at some hypothetical future time the employer might not have been financially able to make the promised deferred compensation payments." (Petition for Writ of Certiorari at i). As shown below, however, neither of the "holdings" which Petitioners present for review actually formed the basis for the Third Circuit's decision. Rather, in a fact-bound review of unique circumstances, the Third Circuit determined simply that the District Court's findings on damages were not "clearly erroneous." Pet. App. 15. Contrary to Petitioners' assertions, no "new law" was created by that decision, and no conflict between the Circuits has

developed. Therefore, for the reasons explained below, the Petition for Writ of Certiorari should be denied.

A. The Third Circuit's Approach To Calculating Potential Damages From Lost Tax Deferral Was Reasonable And Wholly Consistent With Existing Law.

According to Petitioners, the Third Circuit determined as a matter of law that projections as to future tax rates were "too speculative" to support a recovery of damages for tax losses. Even a cursory reading of the Third Circuit's opinion, however, reveals that the Court arrived at no such blanket legal conclusion. Rather, in upholding the District Court's fact-specific determinations, the Third Circuit agreed that, based on the entire factual record before it, Petitioners had not met their burden of proving actual damages.

The record on appeal provided more than sufficient evidence to support the Third Circuit's conclusion that Petitioners failed to prove their claim for actual damages. As noted above, the record evidence demonstrated that Petitioners had actually reaped economic gains from the early termination of the Plan. In part, this was because the maximum federal income tax rate had increased dramatically during the Petitioners' retirement, from thirty-one percent to 39.6%. By accepting accelerated distributions of their benefits while tax rates were at near historic lows, Petitioners greatly minimized their tax burdens.

The Third Circuit found this to be probative of Petitioners' lack of damages, stating as follows:

> [A]s ICI properly points out, by virtue of the plan termination the appellants' account balances were taxed at a much lower rate than would have been the case had payments been made several years later.

Pet. App. 14.

The speculative nature of projecting future tax rates, moreover, was only *one factor among many* that led the Third Circuit to conclude that Petitioners had failed to prove damages. As the Circuit Court specifically noted, "the tax consequences of the accelerated payments were simply part of a larger picture including investment rates of return which the district court concluded did not establish that appellants had suffered or would suffer any financial loss as a result of the acceleration of payments."[3] (*Id.*). The other factors militating against an award of damages included Petitioners' failure to seek immediate injunctive relief, failure to account for "the risk involved in keeping money in an unfunded plan," and failure to prove "that they incurred management fees and transactions costs as a result of the breach." (*Id.*).

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[3] Regarding the "investment rate of return," ICI's expert demonstrated at trial that Petitioners' projected rates of return were grossly inflated. The District Court credited ICI's expert on this point which, both sides acknowledged, was critical to the damages model. Since Petitioners did not provide any alternative damage calculations using different rates of return, it is obvious that the District Court could not have granted the relief which they requested without engaging in speculation.

Petitioners distort the Third Circuit's analysis by seizing a single sentence from the opinion and exaggerating its impact. The Third Circuit's passing comment about future tax rates was not the basis for the Court's holding in this case. Indeed, it was only one of many factors that prompted the Third Circuit to conclude that Petitioners' case was based on "utterly speculative damages."

Try as they might, Petitioners cannot transform an isolated statement into a split of authority between the Circuits. The Third Circuit did not reject the analysis in *Oddi v. Ayco Corp.*, 947 F.2d 257, 261-62 (CA7 1991). Rather, the Third Circuit's decision rests on its sensible conclusion that the District Court's factual findings as to damages were not "clearly erroneous," Pet. App. 15 – a well-reasoned, fact-bound determination that does not merit review by this Court. ICI respectfully requests, therefore, that the Petition for Certiorari be denied.[4]

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[4] ICI must also note that a strong alternative basis exists to support the Third Circuit's decision. At the trial and appellate levels, ICI argued that the damages sought by Petitioners constituted extracontractual damages, which are not recoverable under 29 U.S.C. § 1132(a)(1)(B) or 1132(a)(3). The Third Circuit stated "We are inclined to agree with ICI . . . [b]ut be that as it may, we decline to resolve such intricate issues of ERISA law because appellants failed at trial to prove they were damaged at all." Pet. App. 12. Given this alternative basis for affirmance, Petitioners would be unlikely to prevail in this action even if they could convince this Court that the Third Circuit's decision was otherwise erroneous.

B. The Lower Court's Consideration Of A Risk Premium For Unfunded Pension Benefits Was Not Erroneous.

Petitioners inaccurately characterize the "risk premium" that was accepted by the District and Circuit Courts. They argue that ICI used the risk premium to reduce the damages award, much like a discount rate is used to reduce a future sum to present value. Each of the cases which they cite, including this Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 537 (1983), involves the rather mechanical task of discounting future damages to present value.

Petitioners' argument reflects a fundamental misunderstanding of the risk premium. The risk premium was not used to discount future damages. It was used to value alternative forms of assets or benefits, just as it is used routinely in the financial markets, in order to determine whether Petitioners were *damaged at all* by the early distributions of their account balances.

All corporate debt – like ICI's unfunded obligation to make future distributions to Plan participants – carries some risk of default. Debt issued by the largest and most financially secure corporations carries a relatively modest premium, which is measured by the difference between the interest rate paid on the bond, and the interest rate paid by the United States government on treasury securities bearing comparable maturity dates. Financially troubled companies must pay a larger premium – in the form of a higher rate of return – to attract investors, who would not purchase such securities if they did not receive enhanced compensation for the additional risk associated

with such debt. The size of the risk premium varies depending on the magnitude of the risk of default.

Professor Jeremy Siegel, a distinguished professor at the Wharton School of the University of Pennsylvania, explained how the risk premium applies to this case. As he testified, the determination of whether Petitioners incurred any damages at all required the valuation of two alternative forms of benefits: the first, a long-term distribution from general corporate assets under the Plan and, the second, an accelerated distribution upon the Plan termination. The first alternative bore some risk of default by ICI. The second alternative, however, was risk-free, *i.e.*, there was no risk of a future default by ICI. Using published ratings of debt from services such as *Moody's* and *Standard & Poor's*, Professor Siegel developed a risk premium that the marketplace would have used in valuing the unfunded debt by ICI to Plan participants. That risk premium was one of a number of factors, including assumptions relating to rates of return and tax rates, which were then incorporated into an economic model. That model, as explained by ICI's other expert, Mr. Schaefer, showed that Petitioners' economic positions were enhanced considerably as a result of the Plan termination.

Petitioners' argument, therefore, misses the point. Their case is not analogous to a hypothetical automobile accident case, in which future medical expenses and lost wages must be reduced to present value. It is also unlike the typical breach of contract action, in which a party fails to pay an amount that is owed. Here, the Plan accounts were distributed fully. The issue at trial was not

the discounting of the unpaid pension benefits themselves, but the valuation of alternative forms of payment of those benefits in full. The courts below opted for a methodology which incorporated principles that are used universally in the financial markets. There was no error in adopting such a methodology, nor have Petitioners cited cases from any other Circuits which suggest that market value is an inappropriate measure in conducting a valuation of this nature.

In fact, this Court has recognized that risk is an appropriate factor to be considered in valuing an asset. In *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), an owner of a laundry challenged the compensation that was provided by the government when the facility was temporarily condemned for use by the military. The Court noted that in valuing the business as a going concern, a purchaser would measure the probable return upon investment by capitalizing such returns "at a rate *taking into account the element of risk* and the number of years during which these factors would probably have effect. . . ." 338 U.S. at 17 (footnote omitted) (emphasis added). The opinion in *Kimball Laundry* has been cited for the proposition that the "estimation of risks is part of the business of valuation." 1 Dan Dobbs, *Law of Remedies: Damages-Equity-Restitution* § 3.5, at 332 n.54 (2d ed. 1993).

Petitioners do not deny that risk is appropriately considered in valuing assets or forms of benefits. Nevertheless, they omitted this important variable from their expert's analysis. This failure in Petitioners' model left the District Court to speculate as to the comparative

values of the alternative distribution methods. The District Court and the Third Circuit prudently declined to engage in such speculation. Petitioners should not be granted Certiorari to remedy their own evidentiary shortcomings.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The Petition for Writ of *Certiorari* ("Petition") raises the question whether Congress' expressed intent that deferred compensation plans be enforceable under ERISA was undermined by a decision holding, *inter alia,* that (1) the unpredictability of future tax rates, and (2) the possibility that the promised deferred payments may never be made, each render damages too speculative to be recoverable. ICI, in its Brief in Opposition, does not mention ERISA or even refer to the clash between the decision and the intent of Congress. It responds, instead, that the decision was "a well-reasoned, fact-bound determination" (Brief in Opposition at 7), a "fact-bound review" which upheld the District Court's "fact-specific determinations" (*id.* at 4, 5); that petitioners have "transform(ed) an isolated statement into a split of authority between the Circuits" *(id.* at 7); and that those "two narrow legal holdings" were not the real basis for the Court of Appeal's conclusion *(id.* at 4, 7). (Emphasis added)

We refer this Court to the Court of Appeals Opinion (App. 2a, 14a-15a), which speaks for itself. This was not a "fact-bound determination"; indeed the heart of the appeal to the Court of Appeals was that the District Court violated Fed.R.Civ.P. 52(b) in failing to make findings of fact. This and other errors below were not regarded as appropriate reasons for *certiorari* (see Petition at n. 3). But the two issues that have been raised were holdings with obvious implications that go far beyond the facts of this case, and the first of those two holdings is squarely at odds with the Seventh Circuit's decision in *Oddi v. Ayco Corp.,* 947 F.2d 257 (7th Cir. 1992).

Regarding the second holding, the Petition notes (at 4, 9) that neither the trial judge, nor the Court of Appeals, nor ICI cited any authority to support the inclusion of a "risk premium" factor in a damage award, whether under ERISA or otherwise. ICI's response (Brief in Opposition at 10) is that petitioners likewise have not cited cases suggesting "that market value is an inappropriate measure in conducting a valuation of this nature", citing Justice Frankfurter's decision in *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949), for

the proposition that risk is taken into account in determining an appropriate capitalization rate to use in valuing assets.

This is not an eminent domain case. ICI is trying to inject into the emerging ERISA common law, damage principles used to determine the value of a business or real estate when a condemnor is required to pay the property owner the amount a third party purchaser would have paid him in an uncoerced negotiation. But in determining damages in this breach of contract case, we are not "conducting an evaluation." A promisor has broken a promise to allow the promisee to have the benefits of tax deferral by deferring his compensation to a later date. The value of the promise that was broken is the after-tax dollar difference between (a) the present value of the amounts that were to have been paid later and (b) the amount prematurely paid. Doubtless were a third party purchasing a retiree's rights to those promised future payments such a purchaser, in determining value, would take into account the risk that the employer might not be able to make them. To such a purchaser the employer's credit rating would be relevant. But it does not follow, as ICI suggests, that the employer itself, the breaching promisor, should be entitled to a reduction in damages because of its own poor credit.[1] Such an absurdity should not be permitted to become one of the

1. Even more disturbing, that claim is being made by the current executives who, at the same time that they terminated the plan for the retired executives, created a new tax-deferred plan for themselves with no apparent concern that ICI might not be able to make the payments in the future. (Petition at 3).

principles of the developing federal ERISA common law. *Kimball Laundry, supra,* has no application to this case whatever; the applicable principles regarding risk are those stated in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 537, 103 S. Ct. 2541, 2550 (1983) and the other authorities cited at page 9, note 9 of the Petition.

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